

1 EDDIE R. JIMENEZ (CA SBN 231239)
2 ANNE W. HAMANN (CA SBN 254327)
3 PITE DUNCAN, LLP
4 4375 Jutland Drive, Suite 200
5 P.O. Box 17933
6 San Diego, CA 92177-0933
7 Telephone: (858) 750-7600
8 Facsimile: (619) 590-1385

9 Attorneys for JPMORGAN CHASE BANK, NATIONAL
10 ASSOCIATION

11 UNITED STATES BANKRUPTCY COURT
12 EASTERN DISTRICT OF CALIFORNIA - MODESTO DIVISION

13 In re

14 MARTIN GONZALES AND YOLANDA
15 GONZALES,

16 Debtor(s).

Case No. 10-90735

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

17 JPMORGAN CHASE BANK, NATIONAL
18 ASSOCIATION,

19 Movant,

20 vs.

21 MARTIN GONZALES AND YOLANDA
22 GONZALES, Debtor(s); MICHAEL D.
23 MCGRANAHAN, Chapter 7 Trustee,

Respondents.

LBR 4001-1 and 9014-1(f)(1)

DATE: August 25, 2010

TIME: 10:00 a.m.

CTRM:

1200 I Street, Suite 4
Modesto, CA 95354

24 /./

25 /./

26 /./

27 /./

28 /./

1 JPMorgan Chase Bank, National Association¹ ("Movant"), moves this court for an order
2 terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and
3 continue all acts necessary to enforce its security interest in real property generally described as 536
4 Cormorant Drive, Modesto, California 95354.

5 On or about March 1, 2010, Martin Gonzales and Yolanda Gonzales ("Debtors") filed a
6 voluntary petition under Chapter 7 of the Bankruptcy Code, and Michael D. McGranahan was
7 appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against
8 Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

9 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I.**

12 **MOVANT IS ENTITLED TO RELIEF FROM THE**
13 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

14 **NO EQUITY**

15 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
16 debtor does not have any equity in the property and the property is not necessary to the debtor's
17 effective reorganization.

18 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
19 § 362(d)(2) reflects congressional intent to allow creditors to
20 immediately proceed against the property where the debtor has no
21 equity and it is unnecessary to the reorganization, even where the
22 debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

23 Id. at 610 (emphasis added).

24 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
25 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
26 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from

27 ¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to
28 receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004,
notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize
Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act
as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.
2 1984).

3 An appropriate cost of sale factor should also be added to determine if the debtor has any
4 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
5 (Bankr. S.D. Cal. 1982).

6 On or about February 23, 2007, Debtors, for valuable consideration, made, executed and
7 delivered to 1st National Lending Services, A California Corporation ("Lender") a Note in the
8 principal sum of \$290,800.00 (the "Note"). Pursuant to the Note, Debtors are obligated to make
9 monthly principal and interest payments commencing April 1, 2007, and continuing until March 1,
10 2037, when all outstanding amounts are due and payable. The Note provides that, in the event of
11 default, the holder of the Note has the option of declaring all unpaid sums immediately due and
12 payable. A true and correct copy of the Note is attached to the concurrently served and filed Exhibits
13 to the Declaration in Support of Motion for Relief From Automatic Stay ("Exhibits") as exhibit A
14 and incorporated herein by reference.

15 On or about February 23, 2007, the Debtors made, executed and delivered to Lender a Deed
16 of Trust (the "Deed of Trust") granting Lender a security interest in real property commonly
17 described as 536 Cormorant Drive, Modesto, California 95354 (the "Real Property"), which is more
18 fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
19 incurred as a result of the Debtors' bankruptcy case may be included in the outstanding balance
20 under the Note. The Deed of Trust was recorded on March 2, 2007, in the Official Records of
21 Stanislaus County, State of California. A true and correct copy of the Deed of Trust is attached to the
22 Exhibits as exhibit B and incorporated herein by reference.

23 Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned and
24 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
25 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C
26 and incorporated herein by reference.

27 The obligation under the Note is in default as of April 1, 2009, for failure to make payments
28 to Movant. As of June 10, 2010, the total obligation due and owing under the Note is in the

1 approximate amount of \$317,885.96, representing the principal balance of \$290,800.00, interest in
2 the sum of \$23,681.11, escrow advances in the amount of \$2,996.95, late charge in the amount of
3 \$386.20, and other fees of \$21.70. This is an approximate amount for purposes of this Motion only,
4 and should not be relied upon as such to pay off the subject loan as interest and additional advances
5 may come due subsequent to the filing of the Motion. An exact payoff amount can be obtained by
6 contacting Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees
7 and costs in bringing the instant Motion. Moreover, the total arrears under the Note are in the
8 approximate sum of \$26,578.20, excluding the post-petition attorneys' fees and costs incurred in
9 filing the instant Motion.

10 II.

11 RELIEF FROM STAY

12 LACK OF EQUITY AND SURRENDER

13 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
14 Statements, the fair market value of the Property is approximately \$150,000.00. True and correct
15 copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as
16 exhibit D and incorporated herein by reference.

17 Based on the above, Movant maintains that the equity in the Property is as follows:

18 Fair Market Value:	\$150,000.00
19 Less:	
20 Movant's Trust Deed	\$317,885.96
21 Bank of Americas 2nd Trust Deed	\$71,800.00
22 Costs of Sale (8%)	<u>\$12,000.00</u>
23 Equity in the Property:	\$<251,685.96.

24 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
25 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
26 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

27 Debtors' Statement of Intent indicates it is the intent of the Debtors to surrender the Real
28 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtors'
Statement of Intent is attached to the Exhibits as exhibit E and incorporated herein by reference.

1 III.
2 MOVANT IS ENTITLED TO RELIEF FROM THE
3 AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

4 CAUSE - LACK OF ADEQUATE PROTECTION

5 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
6 protection of its interest in the Property.

7 Movant submits that adequate protection in this case requires normal and periodic cash
8 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
9 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

10 Movant is informed and believes that Debtors are presently unwilling or unable to provide
11 adequate protection to the Movant and there is no probability that adequate protection can be
12 afforded to Movant within a reasonable time.

13 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
14 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

15 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

16 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
17 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

18 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

19 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
20 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
21 the Property;

22 4. Permitting Movant to offer and provide Debtors with information re: a potential
23 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
24 Mitigation Agreement, and to enter into such agreement with Debtors;

25 5. Alternatively, in the event this court declines to grant Movant the relief requested
26 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
27 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
28 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay

1 when due (a) the monthly installments of principal and interest, as required under the Note;
2 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to
3 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
4 filing of this motion;

5 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
6 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
7 and

8 7. For such other and further relief as the court deems just and proper.

9
10 Dated: July 21, 2010

PITE DUNCAN, LLP

11
12 /s/ Eddie R. Jimenez(CA SBN 231239)
13 EDDIE R. JIMENEZ
14 Attorneys for JPMORGAN CHASE BANK,
15 NATIONAL
16 ASSOCIATION
17
18
19
20
21
22
23
24
25
26
27
28